HARAPAN RAMAI SDN BHD v. WAK KUARI SDN BHD

COURT OF APPEAL, PUTRAJAYA
ALIZATUL KHAIR OSMAN JCA
NALLINI PATHMANATHAN JCA
ZABARIAH MOHD YUSOF JCA
[CIVIL APPEAL NO: J-02 (NCVC)(W)-1051-2015]
23 AUGUST 2016

DAMAGES: *Measure of damages – Assessment – Explosion at defendant's quarry due to plaintiff's negligence – Termination of contract – Counter claim – Nominal damages – Appeal against decision of High Court – Whether receipts produced to prove defendant made payment to relevant parties – Loss of profit – Whether proved – Payment of wages to defendant's employees – Whether payment credited into defendant's employees' account – Whether defendant proved its claim under various heads of damages*

Vide contract dated 1 April 2010, the defendant engaged the plaintiff as its contractor to execute drilling and blasting of granite blocks at the defendant's quarry. On 19 July 2013, whilst the quarrying works were being carried out, an uncontrolled explosion occurred at the quarry causing the loss of one life and damages to nearby properties. As a consequence, the defendant terminated the contract and refused to pay the balance due to the plaintiff under the contract. The defendant alleged that it had incurred losses and damages due to the negligence of the plaintiff's agents/workers. The plaintiff then filed a claim against the defendant for the balance sum due to the plaintiff under the contract. On the other hand, the defendant filed a counter claim against the plaintiff for the losses suffered by the former due to the breach of contract by the plaintiff and for the negligence in carrying out the quarrying works at the quarry. The defendant claimed for the following heads of damages and argued, *inter alia,* that (i) RM15,000 was spent for the appointment of Messrs KF Lee Mining Consultant & Surveyor to conduct a survey on the defendant's site and to prepare a report for proposals to carry out controlled rock explosions; (ii) RM418,848.27 was paid as wages to its employees for ten months from July 2013 and the payment was made during the period the said quarry was not operational due to the negligence of the plaintiff; and (iii) it suffered loss of business profits calculated from 19 July 2013 until 31 March 2014 in the sum of RM4,006,441. The High Court Judge allowed the plaintiff's claim and also found that the defendant had proven liability against the plaintiff. However, the judge only awarded nominal damages in the sum of RM10 for loss of profits incurred by the defendant. The judge decided, *inter alia,* that (i) the claim for the appointment of the consultant was dismissed since the defendant failed to produce receipts issued by 'Perunding Kuari KL Lee' or to call a witness from the said consultant's firm; (ii) the defendant failed to tender any other documents to

support its annual reports in relation to the loss of profit it suffered; and (iii) the defendant was involved in other businesses and was not able to prove that the employees were not working elsewhere, to qualify a claim for payment of wages to its employees. Dissatisfied, the defendant filed an appeal to this court with regards to the nominal damages awarded by the trial court. The plaintiff, however, argued that the defendant failed to show as to how the claim under these heads of damages was due to the explosion.

Held (allowing appeal in part)
Per Zabariah Mohd Yusof JCA delivering the judgment of the court:

(1) The issue on causation should not have been raised in this appeal. The trial judge had adjudged on the liability issue and the plaintiff did not appeal on that finding. Further, as a result of the explosion, the State Authority ordered for the closure of quarry activities. Hence, the defendant ceased its quarrying activities after the explosion happened. (paras 19 & 20)

(2) As for the claim for the appointment of the consultant, D17 showed two payment vouchers in the amount of RM10,000 and RM5,000 respectively being payment made to payee 'KF Lee Mining Consultant & Surveyor' for the quarrying works. Among others, there was a signature in both the documents at the space 'signature of recipient'. The signature seemed to be similar to the signature found at p. 317 of the records of appeal which belonged to KF Lee Mining Consultant & Surveyor. As far as the payment voucher was concerned, at the recipient column it was stated 'banked into account'. This fact had not been challenged by the plaintiff. In the circumstances, despite the absence of receipts from the consultant firm, the payment vouchers were sufficient to show that payment had been made to the said firm. The trial judge erred in refusing the claim for this head of damages as the claim had been sufficiently proved by the production of the payment vouchers in D17. (paras 25-27)

(3) No other methods were suggested that could be used to calculate the loss of profits incurred by the defendant. It would be acceptable as long as it was the best formula available for estimate of future loss of profits. The trial judge erred in rejecting this evidence entirely on the grounds that it was an estimate. Loss of profits, by its very nature, could not be proved by documents in existence as it relates to a future event. The defendant had sufficiently proved the head of damages for the loss of profits by calling the auditor and producing the audited report to establish the projected profits. Further, there was no rebuttal evidence called by the plaintiff to challenge or rebut the evidence of the auditor. (paras 33-35)

(4) Although it was not denied that there were instructions to the bank to make payment into the respective accounts of the defendant's employees, there was no evidence to show that the bank had carried out the instructions by the defendant. The defendant could have adduced evidence from the bank to show that the payments had been credited into the respective account of the employees or alternatively, the employees could have testified in court to confirm that they had received payment for their wages from the defendant for the relevant period. However, none of these were done by the defendant. Doubts arose as to whether payments were actually made to the said employees. In any event, the payment instruction letters were insufficient to prove that payment was made by the defendant to its employees. (paras 40 & 42)

(5) The trial judge committed an error by deciding that the defendant was involved in other businesses and the defendant had to prove that its employees were not working elsewhere in order to qualify a claim for the wages. One could not prove a negative. In the circumstances, if the plaintiff asserts that the employees were working in other places during those periods, by virtue of ss. 101 and 103 of the Evidence Act 1950, it was for the plaintiff to prove such an assertion. (para 41)

Bahasa Malaysia *Headnotes*

Melalui kontrak bertarikh 1 April 2010, defendan telah melantik plaintif sebagai kontraktornya untuk melakukan kerja-kerja penggerudian dan letupan granit di kuari defendan. Pada 19 Julai 2013, semasa kerja-kerja penggerudian dijalankan, satu letupan yang tidak terkawal berlaku di kuari, menyebabkan kehilangan nyawa dan kerugian kepada hartanah berdekatan. Akibatnya, defendan menamatkan kontraknya dengan plaintif dan enggan membayar jumlah baki yang perlu dibayar kepada plaintif berdasarkan kontrak. Defendan menghujahkan kehilangan dan kerugian dialaminya akibat kecuaian ejen/pekerja-pekerja plaintif. Plaintif kemudian memfailkan tuntutan terhadap defendan untuk baki jumlah yang perlu dibayar kepada defendan bawah kontrak tersebut. Sebaliknya, defendan memfailkan tuntutan balas terhadap plaintif untuk kerugian yang dialami olehnya akibat kemungkiran kontrak oleh plaintif dan kecuaian semasa menjalankan kerja-kerja di kuari. Defendan menuntut jumlah berikut dan menghujahkan, antara lain, bahawa (i) RM15,000 dibayar untuk pelantikan Tetuan KF Lee Mining Consultant & Surveyor sebagai perunding untuk menjalankan kaji selidik di tapak defendan dan menyediakan laporan untuk cadangan menjalankan letupan batu-bata; (ii) RM418,848.27 dibayar sebagai gaji sepuluh bulan dari Julai 2013 untuk pekerja-pekerjanya dan bayaran tersebut dibuat semasa kuari tidak beroperasi akibat kecuaian plaintif; dan (iii) ia mengalami kerugian keuntungan perniagaan yang dikira dari 19 Julai 2013 sehingga

1 Mac 2014 untuk jumlah RM4,006,441. Hakim Mahkamah Tinggi membenarkan tuntutan plaintif dan mendapati defendan telah membuktikan liabiliti terhadap plaintif. Walau bagaimanapun, hakim bicara hanya mengawardkan jumlah nominal sebanyak RM10 untuk kehilangan keuntungan yang dialami oleh defendan. Hakim bicara memutuskan, antara lain, bahawa (i) tuntutan pelantikan perunding ditolak memandangkan defendan gagal mengemukakan resit-resit yang dikeluarkan oleh 'Perunding Kuari KL Lee' atau memanggil saksi daripada firma perunding tersebut; (ii) defendan gagal mengemukakan apa-apa dokumen lain untuk menyokong laporan tahunannya berkaitan kehilangan keuntungan yang dialami; dan (iii) defendan terbabit dengan perniagaan-perniagaan lain dan defendan tidak dapat membuktikan bahawa pekerja-pekerjanya tidak bekerja di tempat lain. Tidak berpuas hati, defendan memfailkan rayuan ke mahkamah ini bagi kerugian nominal yang diawardkan oleh mahkamah bicara. Plaintif, walau bagaimanapun, menghujahkan defendan gagal menunjukkan bagaimana tuntutan bawah kerugian yang dituntut disebabkan oleh letupan yang berlaku.

Diputuskan (membenarkan sebahagian rayuan)
Oleh Zabariah Mohd Yusof HMR menyampaikan penghakiman mahkamah:

(1) Isu berkenaan penyebab tidak boleh dibangkitkan dalam rayuan ini. Hakim bicara memutuskan isu liabiliti dan plaintif tidak merayu terhadap dapatan tersebut. Selanjutnya, disebabkan letupan yang berlaku, Pihak Berkuasa Tempatan mengarahkan penutupan aktiviti-aktiviti kuari. Oleh itu, defendan menghentikan aktiviti kuarinya selepas letupan berlaku.

(2) Bagi tuntutan pelantikan perunding, D17 menunjukkan dua bayaran baucar untuk jumlah RM10,000 dan RM5,000 masing-masing kepada 'KF Lee Mining Consultant & Surveyor' bagi kerja-kerja kuari. Antara lain, terdapat tanda tangan atas kedua-dua dokumen tersebut di bahagian 'tanda tangan penerima'. Tanda tangan tersebut sama dengan tanda tangan pada ms. 317 rekod rayuan yang dimiliki oleh KF Lee Mining Consultant & Surveyor. Bagi baucar bayaran pula, perkataan 'banked into account' dinyatakan di bahagian penerima. Fakta ini tidak dicabar oleh plaintif. Dalam keadaan ini, walaupun resit-resit daripada firma perunding tidak dikemukakan, baucar bayaran cukup untuk menunjukkan bahawa bayaran dibuat kepada firma tersebut. Hakim bicara terkhilaf apabila menolak tuntutan untuk kerugian ini memandangkan tuntutan ini telah pun dibuktikan dengan pengemukaan baucar bayaran di D17.

(3) Tiada cara lain dicadangkan untuk mengira kehilangan keuntungan yang dialami oleh defendan. Ia boleh diterima asalkan ia merupakan formula terbaik untuk menganggarkan kehilangan keuntungan masa depan. Hakim bicara terkhilaf apabila menolak keseluruhan keterangan ini atas

alasan bahawa ini adalah anggaran sahaja. Kehilangan keuntungan, berdasarkan sifatnya, tidak boleh dibuktikan melalui dokumen-dokumen yang wujud memandangkan ini berkaitan dengan perkara yang akan berlaku pada masa depan. Defendan telah membuktikan kehilangan ini dengan memanggil juruaudit dan mengemukakan laporan audit untuk membuktikan keuntungan yang akan dicapai olehnya. Tambahan, tiada keterangan bantahan yang dikemukakan oleh plaintif untuk mencabar atau membantah keterangan juruaudit.

(4) Walaupun tidak dinafikan bahawa arahan telah diberi kepada pihak bank untuk membuat bayaran ke dalam akaun pekerja-pekerja defendan, tiada keterangan untuk menunjukkan bahawa bank mengikut arahan defendan. Defendan sepatutnya mengemukakan keterangan daripada bank untuk menunjukkan bayaran dimasukkan ke dalam akaun pekerja masing-masing atau secara alternatif, pekerja-pekerja defendan boleh memberi keterangan di mahkamah untuk mengesahkan mereka menerima bayaran untuk gaji mereka daripada defendan untuk tempoh tertentu. Walau bagaimanapun, defendan tidak berbuat demikian. Keraguan berbangkit sama ada bayaran telah dibuat kepada pekerja-pekerja tersebut. Dalam apa jua keadaan, surat arahan untuk bayaran tidak cukup untuk membuktikan bayaran telah dibuat oleh defendan kepada pekerja-pekerjanya.

(5) Hakim bicara terkhilaf apabila memutuskan defendan terbabit dengan perniagaan lain dan defendan perlu membuktikan pekerja-pekerjanya tidak bekerja di tempat lain untuk berjaya membuktikan tuntutan gaji untuk pekerja-pekerjanya. Sesuatu pihak tidak boleh membuktikan yang negatif. Dalam keadaan ini, jika plaintif menghujahkan pekerja-pekerja defendan bekerja di tempat lain pada tempoh tertentu, maka, bawah ss. 101 dan 103 Akta Keterangan 1950, plaintif perlulah membuktikan tuduhan sebegitu.

Case(s) referred to:
SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor [2016] 1 CLJ 177 FC ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 101, 103

For the appellant - Aaron Mathews & Sharifah Leila; M/s Abdul Raman Saad & Assocs
For the respondent - P Latika & SK Lim; M/s Sing Lim & Low

[Editor's note: For the High Court judgment please see Wak Kuari Sdn Bhd lwn. Harapan Ramai Sdn Bhd [2016] 2 CLJ 526 (overruled in part).]

Reported by Kumitha Abd Majid

A

JUDGMENT

Zabariah Mohd Yusof JCA:

[1] This is an appeal by the appellant/defendant herein which arose from the decision of the learned High Court Judge who awarded a nominal sum
B of RM10 on the defendant's counterclaim although the learned High Court Judge had made a finding, *inter alia*, that the respondent/plaintiff herein was negligent.

Parties will be referred to as they were originally referred to in the High Court.

C

Background

[2] The plaintiff and the defendant entered into a contract for quarrying dated 1 April 2010 (hereinafter referred to as "the contract"), whereby the defendant engaged the plaintiff as its contractor to execute drilling and
D blasting of granite blocks at the defendant's quarry at Bukit Lunchu, Masai, Johor. The contract was to be for a period of two years effective from 1 April 2010 with an option to renew for another year or until termination by the defendant.

[3] The quarrying operations were controlled by the State Secretary
E (Incorporation) Johor which had granted quarrying rights to Mados Sdn Bhd ("Mados") under a lease dated 19 November 1992 and Mados in turn had assigned the said rights to the defendant by an agreement dated 8 December 1992.

[4] The contract period between the plaintiff and the defendant expired on
F 31 March 2013. However, by mutual agreement, the contract was extended until 1 September 2013.

[5] On 19 July 2013, whilst quarrying works were carried out, an uncontrolled explosion occurred at the quarry causing the loss of one life and damage to nearby properties.

G

[6] As a consequence, the defendant terminated the contract. The defendant refused to pay the balance due under the contract due to the explosion which the defendant alleged was due to the negligence of the agents/workers of the plaintiff, which had resulted in the defendant incurring
H losses and damages.

[7] The plaintiff then filed a claim against the defendant in the High Court for the sum of RM1,219,610.08 which the plaintiff claimed as the balance which was due under the contract.

[8] The defendant filed its defence to the claim and a counterclaim against
I the plaintiff for the losses which the defendant had suffered due to the breach of the contract by the plaintiff, and for the negligence by the plaintiff in carrying out the quarrying works at the quarry.

[9] The trial proceeded at the High Court and the learned High Court Judge allowed the plaintiff's claim in the sum of RM1,219,610.08 with interest. For the counterclaim, the learned High Court Judge found that the defendant had proven liability against the plaintiff, however only awarded a nominal sum of damages in the sum of RM10.

[10] Dissatisfied with the judgment of the learned judge, the defendant filed the appeal herein with regards to the nominal damages award ordered by the learned judge.

[11] The basis on which the learned judge awarded RM10 despite making a finding of liability against the plaintiff, was that the defendant failed to prove its claim.

[12] After hearing parties' submissions, we allowed the appeal partly and herein below are our grounds.

The Appeal

[13] The appeal before us is only confined to the following claim of heads of damages by the defendant:

(i) RM15,000 for the appointment of a consultant, Messrs KF Lee Mining Consultant & Surveyor in (prayer (a)) – Claim for the appointment of the consultant;

(ii) RM418,848.27 for the payment of wages beginning July 2013 until December 2013 (prayer (d)) – the wages claim; and

(iii) RM4,006,441 as loss of business profits calculated from 19 July 2013 until 31 March 2014 – the loss of profit claim.

Causation Issue

[14] Before we proceed with the merits of the claim under the various heads of damages, the plaintiff in its submission raised the issue of causation. The plaintiff submitted that the defendant failed to show how the claim under these heads of damages is due to the explosion.

[15] It was submitted by the plaintiff that the first letter from the pentadbir tanah dated 22 July 2013 (D14A) and the prohibition notice (D14B) appear to have been temporary measures taken by the State to facilitate the investigation into the cause of the explosion. The second letter from the pentadbir tanah dated 8 October 2013 addressed the concerns raised by the authorities in the District of Johor Bahru about the operations of quarries in the Bukit Lunchu area in general and this letter was sent following a directive or decision taken by the Johor Government to address the safety issues arising from quarry operations in that area. It was further submitted by the plaintiff that the second letter shows that on 28 August 2013 the State Authorities decided to order and direct the closure of quarries in the area

progressively. The letter also referred to a meeting between the quarry operators and the land office on 12 September 2013 which discussed the decision to shut down the quarry progressively in two years' time. Hence the plaintiff submitted that it would seem that, not only the defendant, but also other quarry operators have been ordered to close down their quarries in the Bukit Lunchu area. This second letter and the letter from Mados made no reference to the explosion and therefore the shutting down of the defendant's quarry cannot be attributed to any fault on the part of the plaintiff. The plaintiff further submitted that it is not known if the defendant made any effort to challenge the decisions by the State Authority and Mados in separate proceedings.

[16] In addition, it was submitted by the plaintiff, that according to the notes of proceedings at pp. 220 and para. 2 p. 253 of RR vol 2, in the company's annual reports of the defendant (pp. 206-238 and 2390271 at RR vol. 2), the defendant's lease of the quarry expired in October 2003. The defendant was granted a conditional approval from the State Government for the extension of the lease for a second ten-year term with Mados. The defendant was granted a further extension of a two-year term *vide* the pentadbir tanah's second letter in October 2014. Mados terminated its arrangement with the defendant *vide* letter of 29 April 2014 (p. 281 RR vol 2).

[17] Hence it was submitted by the plaintiff that the damage and loss suffered by the defendant, if any, arose as a result of the State directive and the termination by Mados and not as a result of the accident. The damage did not naturally arise in the usual course of things from the alleged breach of contract and if anything, was damage that was remote and indirect, and not foreseeable by a reasonable man.

[18] The learned judge does not appear to have made any finding on the causation issue or whether the loss and damage were remote or unforeseeable, nevertheless he deliberated on the issue of quantum.

[19] We are of the view that the causation issue should not have been raised in this appeal. The learned judge had adjudged on the liability issue and the plaintiff did not appeal on that finding. The learned judge found liability against the plaintiff and that the plaintiff had breached the contract and had been found to be negligent.

[20] The letter from the pentadbir tanah dated 22 July 2013 (D14A) clearly stated that due to the explosion on 19 July 2013, it ordered the closure of any quarrying activities immediately until the investigation on the explosion is completed. The defendant's quarry is the place where the accident happened. Hence, the defendant ceased its quarrying activities after the explosion. It is clear from the evidence that as a result of the explosion, the quarry activities were ordered to be stopped by the State Authority.

Claim For The Appointment Of The Consultant

[21] There was a finding by the learned High Court Judge that the plaintiff had breached the contract and was negligent in carrying out the quarrying works at the quarry.

[22] Due to the accident at the quarry, the defendant had to hire a consultant to enable the defendant to obtain approval from the Mineral Geosciences Department of Johor to continue with the quarrying works. The consultant was required to conduct a survey of the site and to prepare a report for proposals to carry out controlled rock explosions.

[23] At the trial, the defendant tendered payment vouchers D17 to show proof of payment to the consultant in the amount of RM15,000. This document was not disputed by the plaintiff.

[24] The learned judge found that the payment voucher at D17 was issued by the defendant and it was not a receipt issued by the consultant, Perunding Kuari KF Lee Consultant & Surveyor. The learned judge was of the view that in the absence of any other evidence, the court cannot accept D17 as proof that the cost of hiring the consultant had been paid by the defendant. The learned judge was of the view that the defendant should have adduced the receipts issued by Perunding Kuari KF Lee or call a witness from the consultant's firm. On that basis, this head of claim was dismissed by the learned judge.

[25] From a perusal of the payment voucher, D17 at pp. 322 and 333 of RR Jilid 3 it showed two payment vouchers in the amount of RM10,000 and RM5,000 respectively being payment to payee, "KF Lee Mining Consultant & Surveyor" for quarrying works. On the said documents, there is a signature in both of the documents at the space "signature of recipient". From p. 322, the signature seems to be similar to the signature found at p. 317 of RR vol 3 which belongs to KF Lee Mining Consultant & Surveyor. As far as the payment voucher at p. 323 is concerned, at the recipient column, it is stated "banked into account." From the notes of proceedings in the records of appeal, this has not been challenged by the plaintiff.

[26] Therefore, despite the absence of receipts from the consultant firm, the payment vouchers are sufficient to show that payment had been made to the consultant's firm.

[27] Therefore we are of the view that the learned judge had erred in refusing the claim for this head of damages as the claim has been sufficiently proven by the production of the payment vouchers in D17.

A **Claim For Loss Of Profits**

[28] The claim by the defendant is for RM4,006,442 as loss of profits as a result of the breach of contract by the plaintiff and/or negligence which caused the uncontrolled explosion.

B **[29]** The learned judge awarded RM10 as nominal damages as the calculation for the loss of profits by the defendant's witness was based on an estimate, which the learned judge refused to accept. The learned judge further stated that the defendant failed to tender any other documents to support the annual reports.

C **[30]** From the notes of proceedings, the defendant had called its auditor, Lew Choon Kiong, DW2, to give evidence and he tendered annual reports for the years 2013 and 2014 which have been marked as D9A and D9B (pp. 206-238 and 239-271 of RR Jilid 2.)

D His evidence stated that the "loss of revenue" of the quarry operation for financial year ended 31 March 2014 due to the suspension of quarry operation was estimated to be RM17,649,518 as compared with the sales revenue of the previous financial year which ended in 31 March 2013.

[31] DW2 further said in evidence that the average gross profit margin for
E the quarry operation was estimated to be around 22.7% as referred to the financial year ended 31 March 2014 which was estimated to be RM4,006,441 (RM17,649,518 x 22.7%).

[32] The defendant had provided a formula for the calculation for the loss of profits. As submitted by the defendant the calculation is as
F follows:

(i) The percentage of profit made by the defendant in the preceding year (ie, 2013) was calculated. For this, p. 133 of RR Jilid 1 is referred wherein DW2 in his evidence had shown that the gross profit from the quarrying operations was 22.7%. This percentage figure was derived after taking
G the sales revenue and subtracting that from the costs of sales and then calculating the percentage. Accordingly, the formula would be:

(a) RM31,490,50 – RM24,344,112 = RM7,146,638 ie, (sales revenue) – (costs of sales) – gross profit

H (b) RM7,146,638 x 100/RM31,490,750 = 22.69% (22.7%) ie, (gross profit) – (sales revenue) = (profit percentage)

(ii) Based on the profit percentage of 22.7%, it was then calculated in Ringgit. In this respect, DW2 explained that by taking 2013 sales revenue and subtracting it from the 2014 sales revenue (before the quarry was shut
I down) it would give an estimate of how much loss of sales revenue there was for 2014.

(iii) Thereafter, DW2 applied the profit percentage of 22.7% to calculate how much the loss of profit was. DW2 explained that the formula would be:

(a) RM31,490,750 – RM13,841,232

= RM17,649,518

ie, (sales revenue for 2013) – (sales revenue for 2014) = (Loss of sales in 2014)

(b) RM17,649,518 x 22.7/100 = RM4,006,441.

[33] From the grounds of judgment, the basis of the learned judge's dismissal of the calculation of the loss of profits by the defendant was because it was based on an estimate.

However, there were no other methods suggested, that can be used to calculate the loss of profits. As long as it is the best formula available for estimate of future loss of profits, it would be acceptable.

Clearly, the learned judge erred in rejecting this evidence entirely, by reason that it was an estimate. Loss of profits, by its very nature, cannot be proved by documents in existence as it relates to a future event.

This proposition is fortified by the Federal Court in the case of *SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor* [2016] 1 CLJ 177; [2015] MLJU 1160 where at para. 119 (CLJ); para. 130 (MLJ) the Federal Court stated that:

> ... The Agreement did not stipulate a formula for calculating loss of profits, and as such the general principles of the common law will apply and a formula that best estimates the future loss of profits will be preferred by the Court.

[34] Therefore, we found that the defendant had sufficiently proved the head of damages for the loss of profits by calling the auditor and producing the audited report to establish the projected profits.

[35] Additionally, the learned judge also found that the loss of profits was not made out because there were no supporting documents.

However, the evidence discloses that excerpts of the auditor's report were produced and the auditor himself, DW2 was called to explain how he worked out the loss of profits and his evidence was not challenged in any manner save as to the fact that his projection was an estimate. There was no rebuttal evidence called by the plaintiff to challenge or rebut the evidence of the auditor.

A **The Wages Claim**

[36] The claim by the defendant was for RM418,848.27 which was for payment of wages to employees for ten months from July 2013. The defendant submitted that this payment of wages had to be made during the period the said quarry was not operational due to the negligence of the B plaintiff and/or breach of the contract, which caused the accident.

[37] In proving its claim, the defendant tendered letters addressed to Public Bank Berhad for a period of ten months commencing from July 2013, which are termed as "payment instruction letters". Together with these payment instruction letters, the defendant had attached a cheque to the same and had C requested Public Bank to credit the cheque into the respective employees' accounts as per the respective payment instruction letters. These payment instruction letters were marked as D24 & D25A-D25I (pp. 345-354 RR Jilid 3).

D **[38]** The learned judge's basis for disallowing this head of claim by the defendant was:

(i) these payment instruction letters were "non-free" documents as they were produced by the defendant;

E (ii) the defendant should have produced appointment letters for these employees or in fact called these employees as witnesses; and

(iii) that as the defendant was involved in other businesses (namely construction and building materials), the defendant had to prove that these employees were in fact not working elsewhere.

F **[39]** The defendant asserted that the learned judge had erred when he said that the payment instruction letters were "non-free" documents as they were produced by the defendant. It was argued that although the payment instruction letters were by the defendant, they were addressed to outsiders. It was even proved that Public Bank had received the letter. Hence, the G defendant had proven that payment for the wages of the employees had been effected.

[40] We disagree with the submission of the defendant in this respect. Although it is not denied that there were instructions to the bank to make payment into the respective accounts of the employees, there was no H evidence to show that the bank had carried out the instructions by the defendant. The defendant could have adduced evidence from the bank to show that the payments had been credited into the respective account of the employees or alternatively, the employees could have testified in court to confirm that they had received payment for their wages from the defendant I for the relevant period. None of these was done by the defendant. Therefore we are left in doubt as to whether payments were actually made to the employees.

[41] The learned judge also expressed his view that the defendant was involved in other businesses and that the defendant had to prove that the employees were not working elsewhere, to qualify for the claim for the wages. This, in our view, is clearly an error on the part of the learned judge. One cannot prove a negative. If the plaintiff asserts that the employees were working in other places during those period, it is for the plaintiff to prove such assertion (ss. 101 and 103 of the Evidence Act 1950 applies).

[42] In any event, the payment instruction letters were insufficient to prove that there was payment by the defendant to its employees and the learned judge has not erred in this respect.

Conclusion

[43] Accordingly, we are constrained to allow the appeal as far as the claims for consultant's fees and the loss of profits are concerned.

[44] With respect to the claim for the workers' salary, we are not convinced that this has been proven sufficiently as there is no documentary proof of receipt of the wages by the employees.

[45] The appeal is therefore allowed in part.

[46] Interest at 5% from the date of judgment of the High Court ie, 28 May 2015 until full realisation.

[47] Costs of RM20,000 to the defendant here and below and deposit is to be refunded.